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THE DARK SIDE OF COUNTERTERRORISM

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At a National Security Forum event entitled “The Dark Side of Counterterrorism”, United States District Judge Michael Davis moderated a discussion with Chris O’Leary, the FBI Agent in Charge of the Upper Midwest Joint Terrorism Task Force (JTTF), and the former Inspector General of the CIA, Professor Frederick Hitz, about the acceptability of certain counterterrorism tactics in a democracy. Because of their varied positions within the criminal justice system and intelligence community, the members of the panel were able to emphasize a range of concerns affecting not only policy-making at an institutional level, but also concrete decision-making at an investigative level.

Judge Davis attended this event just days after completing his service on the Foreign Intelligence Surveillance Act (FISA) Court. In his opening remarks, he emphasized that his position as a federal judge allowed him to observe how law enforcement deals with issues of intelligence and terrorism in criminal trials, while his service on the FISA Court gave him insight on law enforcement’s early development of intelligence sources for the purpose of building a case. Judge Davis reminded the audience that the history of intelligence gathering targeted at American citizens was marked with illegal activities that lead to the inquiries made by the Church Commission in the 1970s. Having noted that Commission’s report and its role in the enactment of FISA, Judge Davis concluded his introduction by emphasizing the need to retain the rule of law even in the face of foreign threats.

Mr. O’Leary then spoke about the role he plays in investigating such threats. His task force investigates threats from al Qaeda, while another task force addresses Hezbollah, Hamas, Iraqi, and other terrorist groups. Mr. O’Leary explained that these task forces carry out a similar mission to the CIA within the U.S., and he emphasized that they are governed principally by the Constitution and guidelines developed by the Attorney General. His group combines the work of skilled agents from a variety of local and federal law enforcement agencies. Mr. O’Leary also mentioned that the USA PATRIOT Act has increased cooperation

between various intelligence agencies that previously had been walled off from domestic investigations.

Discussing specifically what his position entails, Mr. O'Leary outlined the three investigative stages the JTTF employs. The first of these is known as a "threat assessment" and is the least intrusive. In this stage, after a thorough determination that there are sufficient predicate facts to warrant it, a subject may have his background researched. In the next level, a "preliminary inquiry," the JTTF looks at the subject's contacts and financial dealings. At this stage the task force may use a National Security Letter, a request not unlike a subpoena, but with the important difference that it does not alert the suspect to the inquiry being made. Mr. O'Leary stated that agents might interview employers or landlords, for instance, and that whomever is contacted must keep the FBI's interest secret.

The third classification of investigation is known as a "full field investigation" (FFI). These are not particularly common—according to O'Leary an agent might have a dozen active files, but only one or two FFI's—and require a showing of specific facts that a person is involved in international terrorism. Because of more stringent procedural requirements, Mr. O'Leary stressed the difficulty in obtaining permission to classify an investigation at this level. If the subject is a U.S. citizen, Mr. O'Leary reiterated, all the constitutional safeguards apply.

Mr. O'Leary was adamant about the need for sensitivity when, during any of these stages, he deals with people from different cultures. He recounted a recent investigation involving a Saudi man who was staying in a local motel. The man did not speak English, paid his motel bill in cash daily, did not allow housekeeping into his room, and made all of his phone calls from nearby pay phones. As with many of his investigations, this one began with a phone call from an individual who considered the man's behavior suspicious. Agents in Mr. O'Leary's task force interviewed the man and found that he was in the country learning English, and that he was a Saudi of strict Wahabi beliefs, preventing him from using credit. His refusal to allow housekeeping into his room was explained by his desire to prevent strangers from interacting with his wife and child who were occupying it with him. Agents learned that he made his phone calls from a pay phone because the expense of calling Saudi Arabia was greater if he used the motel's telephone. After a short interview, agents resolved any concerns, and the subject felt that he had been treated with respect; Mr. O'Leary stated that the man likely received more respect from the investigating agents than he expected considering the procedures of his own country's security and law

enforcement agencies.

Throughout his remarks, Mr. O'Leary stressed the need for the PATRIOT Act, the requirements for maintaining constitutional protections, and the importance of understanding that the FBI is now involved in what is truly a global war. He expressed confidence that his agency had the proper tools to do its part to help maintain the security of American citizens.

While Agent O'Leary spoke in terms of the specific actions of the JTTF, Professor Hitz took a broader approach to discussing the global war on terrorism. As a former Inspector General of the CIA, and not a current member of any agency, Professor Hitz quipped that he had a "license to shoot his mouth off." He began by discussing generally the deficiencies in intelligence reform since 9/11. Professor Hitz stated that the paramount challenge facing both the FBI and the CIA is counterterrorism. The attacks of 9/11 certainly involved a failure of intelligence, but this failure was widespread, and he would not fix blame on any one agency. That failure was one of predicting a change in enemy tactics; everyone was convinced an attack from al Qaeda would take place overseas. To that point, hijacking methods involved a formula—let the terrorists take the plane, talk them down, or let them land.

Professor Hitz said that *The 9/11 Commission Report* makes clear that the "wall" between agencies must come down, though it is important to remember why those barriers were originally established. He noted that because the FBI focuses on building a case for a criminal trial, while the CIA has an institutional "need to know," their different missions justified the existence of the "wall." This would no longer work in a world where the time from planning to execution is drastically shortened. That the sharing of information between such agencies will play a key role is correct, Hitz argued, but he lamented that such a change is easier to propose than to implement.

Professor Hitz then considered how the intelligence world has been reformed since 9/11. He expressed the opinion that there is no evidence that the new system, which places the Director of National Intelligence (DNI) at the head of the nation's intelligence apparatus is working. Hitz argued that a comprehensive strategy is a good idea, but the notion that there was a need for an "attending physician" is based on the false premise there is a real "intelligence community." In his view coordination among those involved in intelligence collection is necessary, but if the DNI creates nothing more than another level of bureaucracy, then the communication morass is not being solved.

Professor Hitz's remarks then shifted to more specific issues including extraordinary rendition, torture, cruel, inhuman and degrading treatment, and secret prisons. He emphasized that if there is any truth regarding accusations of abuse of these practices by the American government, "it will out." Hitz discussed the successful use in the past of extraordinary rendition in a criminal context. He expressed his opposition to the reported practice of taking captives to locations where they are subjected to treatment below American standards. His objection was based in part on the unresolved question about whether aggressive interrogations are effective. Professor Hitz made clear that he "stands four-square behind the McCain/Levin Amendment . . . even with the President's signing statement that says the U.S. will not use interrogation methods that differ from the Army manual. The hooker is that the Army manual is under revision." Essentially, Hitz argued, the marginal value of the information obtained through these methods is more than overcome, even in a state of war, by the large price paid in harm to the government's reputation.